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No. 06-562

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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RULE 29.6 STATEMENT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Consolidated Edison Company of New York, Inc. ("Con Edison") is the respondent in a petition that is being held pending disposition of this case. See *UGI Utils., Inc.* v. *Consolidated Edison Co. of N.Y., Inc.*, No. 05-1323 (U.S. filed Apr. 14, 2006). Con Edison is thus directly interested in the Court's resolution of the question presented regarding the availability to potentially responsible parties (PRPs) of a private right of action under section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").

Con Edison and its predecessors formerly owned or operated in New York a number of manufactured gas plants (which produce gas from coal, oil, and other sources). *Consolidated Edison Co. of N.Y., Inc.* v. *UGI Utils., Inc.*, 423 F.3d 90, 92-93 (2d Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3600 (U.S. Apr. 14, 2006) (No. 05-1323). In October, 1999, the New York State Department of Environmental Conservation ("NYSDEC") contacted Con Edison regarding the investigation and clean-up of hazardous substances at former manufactured gas plant sites. *Id.* at 93. On September 20, 2001, Con Edison filed a complaint against UGI Utilities, Inc. seeking to recover under CERCLA its response costs at certain of the sites, on the grounds that UGI was liable as the successor to "person[s] who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). On August 15, 2002, Con Edison entered into a Voluntary Cleanup Agreement ("VCA") with NYSDEC to

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[1] No person or entity other than Consolidated Edison Company of New York Inc. or its counsel made a monetary contribution to the preparation or submission of this brief, and no counsel for a party authored this brief in whole or in part. Both petitioner and respondent have consented to the filing of this brief, and the letters of consent have been filed with the Clerk.

investigate and clean up, with NYSDEC oversight, more than 100 properties comprising the former grounds of manufactured gas plants that Con Edison or its predecessors once owned or operated. *Consolidated Edison*, 423 F.3d at 93. Once Con Edison completes its obligations under the VCA, it will receive releases and covenants-not-to-sue from NYSDEC.

The district court granted summary judgment to UGI, but the Second Circuit reversed. It held that Con Edison was not entitled to a contribution remedy under section 113(f)(3) of CERCLA as "[a] person who has resolved its liability to the United States or a State for some or all of a response action." 42 U.S.C. § 9613(f)(3)(B). The Second Circuit construed the release and covenant-not-to-sue that Con Edison was to receive from the NYSDEC under the VCA to encompass only state law claims, and not to resolve fully and finally Con Edison's federal liability to the State of New York under CERCLA. *Consolidated Edison*, 423 F.3d at 95-97. However, the court of appeals held that section 107(a) does grant PRPs like Con Edison a private right of action against other PRPs to recover response costs. *Id.* at 97-103. The Eighth Circuit adopted the same rule below, which the Government has challenged.

Con Edison believes that this brief will be useful to the Court because it presents the perspective of the many PRPs who conduct hazardous waste clean-ups in cooperation with state authorities and who would improperly be denied recovery under the Government's interpretation of section 107(a).

BRIEF OF *AMICUS CURIAE*

The Government's proposed statutory interpretation – that section 107(a) of CERCLA affords a private right of action for cost recovery only to "innocent" parties, Petr. Br. 11 – offends both the plain language and policies of CERCLA. Ironically, the Government principally defends its position as

necessary to encourage PRPs to enter into settlements with federal and state authorities, *id.* at 40, but adoption of the Government's position would likely have precisely the opposite effect. As the Government concedes, "[a]t a substantial number of contaminated sites, States have primary responsibility for cleanup or monitoring." *Id.* at 4 n.3. Given the narrow judicial construction of the contribution remedy provided in section 113(f)(3)(B), countless parties like Con Edison that clean up hazardous substances at sites in good faith under voluntary agreements with state authorities would have no recourse to recover costs from the actual polluters if section 107(a) is narrowed in the manner the Government suggests. Accordingly, if the Court were to accept the Government's construction, PRPs may be inclined to force the State to litigate site clean-up – rather than cooperate with the State – to preserve their rights to recover response costs. The Government's position is bereft of any basis in text or policy.

To avoid duplication of respondent's brief, Con Edison will not engage in a point-by-point rebuttal of the Government's arguments, but will focus on two issues that most directly implicate Con Edison's interests: (1) the irreconcilability of the Government's construction of section 107(a) with the plain language of the statute, and (2) the relationship of sections 107(a) and 113, and the critical need for this Court to interpret section 107(a) in light of the dominant presence of state abatement and oversight activities in this field.

SUMMARY OF ARGUMENT

The Government's proposed construction of section 107(a) has no force. The statute provides that PRPs are liable for "all costs of removal or remedial action *incurred by the United States Government or a State or an Indian tribe* not inconsistent with the national contingency plan," and for "other necessary costs of response *incurred by any other person* consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A) & (B) (emphases added). The phrase "any

other person" is meant to distinguish between the two categories of expressly identified persons incurring such costs, and thus plainly refers to any person other than "the United States Government or a State or an Indian tribe." Pet. App. 30a. The Government's claim that "any other person" refers instead to a person who is not a PRP is an unnatural reading of the text, and indeed it is contrary to the interpretation of this provision in EPA regulations.

Equally fundamentally, the Government's construction cannot be adopted because it eviscerates the contribution remedy of section 113(f)(1). The Government fails to heed the central teaching of this Court in *Key Tronic Corp.* v. *United States*, 511 U.S. 809 (1994), that the text of section 107(a) defines the persons *liable*, not the plaintiffs entitled to enforce that liability. *Id.* at 818 & n.11. Under the Government's reading of the phrase "any other person" in section 107(a)(4)(B), a PRP "shall be *liable*" for the "necessary response costs incurred by" innocent parties (but not by other PRPs). If that were correct, a PRP also could not seek contribution from another PRP under section 113(f). Section 113(f)(1) only authorizes a person to "seek contribution from any other person *who is liable or potentially liable* under section 9607(a) of this title." 42 U.S.C. § 9613(f)(1) (emphasis added). However, if no PRP is "liable" under section 107(a) for response costs incurred by another PRP (as the Government insists), no PRP could ever have a contribution remedy under section 113(f)(1) to recover those costs against a PRP (since contribution may be sought under that provision only against parties with liability for those costs under section 107(a)). That is plainly untenable, and the Government's strained construction of the statute should be rejected.

The Government's arguments are unfounded not only in the text but also in the policy of CERCLA. The Government paints a simple picture for the Court where any PRP need only settle with federal or state authorities and thereby gain a contribution remedy under section 113(f)(1) or (f)(3)(B). The

Government neglects the prevailing judicial construction of section 113(f)(3)(B). That statute makes a contribution remedy available to a person "who has *resolved its liability* to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement." *Id.* § 9613(f)(3)(B) (emphasis added). Courts have interpreted that phrase to require resolution of *federal* liability to a State under CERCLA. However, CERCLA creates federal liability of PRPs to States only for the response costs that a State incurs itself. States have no federal power to order abatement or other response actions under CERCLA, and *state law* governs the liability of a PRP to a State to perform clean-up of hazardous wastes. Courts have denied section 113(f)(3)(B) remedies to PRPs who clean up sites in cooperation with state authorities under state law, ruling instead that the proper remedy is a cost-recovery action under section 107(a). The Government's crabbed construction of section 107(a) would deprive PRPs who cooperate with state authorities of any ability to recover costs from other PRPs (including more culpable parties directly responsible for the hazardous wastes), even though the vast majority of clean-ups occur under state supervision. The Government's position does not reward parties who settle with federal and state authorities, as it claims; at least as to the many PRPs incurring response costs in cooperation with (and under the supervision of) state authorities, it leaves them without any remedy at all.

Congress enacted the express contribution remedies of section 113(f) as a complement to the implied cost-recovery actions of section 107(a), which are available whenever no express remedy is granted to promote the expeditious clean-up of hazardous wastes in this country. This Court should affirm the decision below.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 107(a) OF CERCLA GRANTS POTENTIALLY RESPONSIBLE PARTIES A RIGHT TO SEEK RECOVERY OF THEIR COSTS.

"In 1980, CERCLA was enacted in response to the serious environmental and health risks posed by industrial pollution." *United States* v. *Bestfoods Corp.*, 524 U.S. 51, 55 (1998). "Two of its primary goals include encouraging the timely cleanup of hazardous waste sites, and placing the cost of that cleanup on those responsible for creating or maintaining the hazardous condition." *Consolidated Edison*, 423 F.3d at 94 (internal quotation marks and brackets omitted).

In CERCLA, Congress attacked the problem of hazardous wastes by granting federal abatement powers to the President and creating a scheme of private and public liability for response costs. "Sections 104 and 106 provide the framework for federal abatement and enforcement actions that the President, the EPA as his delegated agent, or the Attorney General initiates." *Key Tronic Corp.*, 511 U.S. at 814. Section 105 directs the President to formulate a national contingency plan ("NCP") that would include "procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants," and would prioritize sites for remedial or response actions. 42 U.S.C. § 9605(a).

Given the extraordinary expense of cleaning up the many thousands of the nation's hazardous-waste sites, Congress created strict liability (subject to specific statutory defenses) for four kinds of PRPs: (1) the current owner and operator of a vessel or a facility; (2) the owner or operator of a vessel or a facility at the time of disposal of the hazardous substance; (3) any person who arranged for disposal or treatment of hazardous substances he owned or possessed at another's vessel or facility; and (4) a transporter who selected a vessel or facility

from which hazardous substances were released. *Id.* § 9607(a). Those PRPs

> shall be liable for –
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id.

In *Key Tronic*, this Court recognized that "§ 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs." *Key Tronic*, 511 U.S. at 818. Indeed, all nine Justices agreed on that point. But whereas the dissent construed the foregoing language as "the *express* creation of a right of action," *id.* at 822 (Scalia, J., dissenting), the majority construed section 107(a) as "only impliedly authoriz[ing] suit," *id.* at 818. The majority reasoned that "Section 107 ... merely says that 'A shall be liable' without revealing to whom A is liable." *Id.* at 818 n.11 (emphasis omitted).

This Court addressed the relationship of sections 107(a) and 113 in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004). Under CERCLA, as originally enacted, courts had long held that "a private party that had incurred response costs, but that had done so voluntarily and was not itself subject to suit, had a cause of action for cost recovery

against other PRPs," but there was uncertainty as to whether "a private entity that had been sued in a cost recovery action (by the Government or by another PRP) could obtain contribution from other PRPs." *Id.* at 161-62. Congress amended CERCLA in the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, to provide express rights of action for contribution. Section 113(f)(1) authorized "[a]ny person [to] seek contribution from any other person who is liable or potentially liable under section [107(a)] of this title, during or following any civil action under section [106] of this title or under section [107(a)] of this title." 42 U.S.C. § 9613(f)(1). Section 113(f)(3)(B) further authorized a contribution remedy for "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement." *Id.* § 9613(f)(3)(B).

In *Cooper*, this Court held that, under the plain terms of the statute, the express section 113(f)(1) contribution remedy could only be pursued "during or following" a section 106 abatement action or a section 107(a) cost-recovery action. 543 U.S. at 168. This Court declined to resolve the relationship of sections 107(a) and 113, *id.* at 168-71, other than to recognize that the remedies created by those sections, while "clearly distinct," "both allow private parties to recoup costs from other private parties," *id.* at 163 n.3.

A. Section 107(a) Specifically Authorizes "Any" Private Person To Recover "Necessary Costs Of Response" From PRPs.

The meaning of section 107(a) is clear. It provides that PRPs are liable for "*all* costs of removal or remedial action *incurred by the United States Government or a State or an Indian tribe* not inconsistent with the national contingency plan," and for "other *necessary* costs of response *incurred by any other person* consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A) & (B) (emphases added).

The purpose of these two subsections is to assign different liability to PRPs for response costs incurred by governmental entities as opposed to response costs incurred by private persons.[2] Under subsection 107(a)(4)(A), "the defendant has the burden of proving that the government's costs are inconsistent with the NCP," whereas "under § 107(a)(4)(B), nongovernmental entities are required to prove that their response costs are necessary and consistent with the NCP." *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 906 n.23 (5th Cir. 1993).

Accordingly, the plain meaning of the phrase "any other person" in context is to distinguish between the two cost-incurring groups to whom different liability is owed: the higher liability standard applies to costs incurred by any person "other" than "the United States Government or a State or an Indian tribe." Pet. App. 30a; *Metropolitan Water Reclamation Dist.* v. *North Am. Galvanizing & Castings, Inc.*, 473 F.3d 824, 835 (7th Cir. 2007) ("we read the two subsections, and the reference to 'any other person,' simply as the statute's way of relaxing the burden of proof for governmental entities as opposed to private parties"). "Person" is a defined term under CERCLA that encompasses the United States Government, States, and Indian tribes, 42 U.S.C. § 9601(21), and so the term "any other person" necessarily refers to *any* person within the definition "other" than the three governmental entities: *i.e.*, any "individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, ... municipality, commission, political subdivision of a State, or any

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[2] The costs of removal and remedial actions referenced in subsection 107(a)(4)(A) are the same as the "costs of response" referenced in section 107(a)(4)(B). *See* 42 U.S.C. § 9607(a)(4)(A) & (B); *id.* § 9601(25) (The terms 'respond' or 'response' means remove, removal, remedy, and remedial action; all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto."); *see also id.* § 9601(23) & (24) (defining "remedy" and "remedial action" and "remove" and "removal").

interstate body." *Id.*[3] Section 107(a)(4)(B) thus provides that a PRP "shall be liable" to *any* person other than the specified governmental persons (including, without limitation, other PRPs) for "necessary costs of response ... consistent with the national contingency plan." *Id.* § 9607(a)(4)(B); *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting *Webster's Third New International Dictionary* 97 (1976)).

Because PRPs have liability for necessary response costs incurred by private PRPs, it takes the smallest leap of implication for this Court to determine who may bring a judicial action to enforce that liability. The Act's creation of liability necessarily implies that there must be some means for parties incurring the costs to enforce the liability of PRPs, or else section 107(a) would be ineffectual; indeed, this is why the three dissenting justices in *Key Tronic* deemed the language "shall be liable" in section 107(a) "the *express* creation of a right of action" in favor of those incurring the costs. 511 U.S. at 822 (Scalia J., dissenting). But, even under the rule of the *Key Tronic* majority (where rights of action must be implied), it follows that every person who has incurred necessary response costs for which a PRP is liable must have a right of action to enforce that liability, and such a right of action must be implied where the Act does not provide an express remedy (such as a contribution remedy under section 113(f)). The Second, Seventh, and Eighth Circuits have properly so concluded. *Consolidated Edison*, 423 F.3d at 100 ("Section 107(a) makes its cost recovery remedy available, in quite simple language, to any person that has incurred necessary costs of response ...."); *Metropolitan Water Reclamation Dist.*, 473 F.3d at 834; Pet. App. 14a (an action under section 107(a) is available to "parties who have incurred necessary

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[3] The definition of "person" explicitly includes the United States Government and a State, and an Indian tribe is an association. 42 U.S.C. § 9601(21).

costs of response, but have neither been sued nor settled their liability under §§ 106 or 107").

B. The Government's Contrary Reading Of Section 107(a) Is Irreconcilable With The Plain Language, Eviscerates The Section 113 Remedy, And Departs From The EPA's Interpretation.

Anxious to avoid response cost actions against it when it is a PRP, the Government advances a narrow construction of section 107(a). It contends that the phrase "any other person" in section 107(a) excludes all PRPs previously enumerated in that section. Petr. Br. 15. That is not the natural reading of the statutory text. As noted above, the designation of "any other person" incurring response costs is meant to exclude the governmental entities – United States, States, and Indian tribes – who also incur response costs, but whose costs are subject to different treatment in subsection 107(a)(4)(B). In any event, even if *arguendo* the phrase "any other person" serves to distinguish the person who has the liability for response costs from the person who incurred them, that would not avail the Government. Section 107(a) provides that certain individual PRPs "shall be liable" for response costs: namely, "the owner and operator of a vessel or a facility" or "any person" who meets the other enumerated stautory criteria. 42 U.S.C. § 9607(a)(1)-(4). The phrase "any other person" to whom that individual PRP is liable would include *other* PRPs, since, as the Government concedes, PRPs are "persons" as defined in CERCLA. *Id.* Moreover, "any other person" means just that; it does not mean "any other person not in the same category" as the liable party. Clearly, for example, a PRP who is the current owner and operator of a facility would not be the same person as a former owner and operator of the facility. The Government's self-serving interpretation cannot be squared with the language of section 107, even when that section is read in isolation.

But statutes are read not in isolation but rather as a whole. *United States* v. *Morton*, 467 U.S. 822, 828 (1984). Therein

lies a central flaw in the Government's argument: its reading of section 107(a) would eviscerate the section 113 contribution remedy that the Government claims is always available to private PRPs after they have been sued or entered into a settlement with federal or state authorities (Petr. Br. 26-31). In its haste to narrow the class of potential PRP plaintiffs, the Government fails to heed the central teaching of *Key Tronic*: namely, that the text of section 107(a) defines the persons *liable*, not the plaintiffs entitled to enforce that liability. 511 U.S. at 818 & n.3. Under the Government's reading of the phrase "any other person" in section 107(a)(4)(B), a PRP "shall be *liable*" for the "necessary response costs incurred by" innocent parties (but not by other PRPs). But, if that were correct, a PRP also could not seek contribution from another PRP under section 113(f). That is because section 113(f)(1) only authorizes a person to "seek contribution from any other person *who is liable or potentially liable* under section 9607(a) of this title." 42 U.S.C. § 9613(f)(1) (emphasis added). According to the Government, a PRP is never liable under section 107(a) for the response costs incurred by another PRP (but only for those incurred by innocent parties). If so, no PRP could seek to recover its response costs in contribution from another PRP under section 113(f)(1), since the latter would have no liability (or potential liability) for those costs under section 107(a).

The Government's house of cards falls down. It cannot insist that PRP "A" has no liability for the costs incurred by PRP "B" under section 107(a), and at the same time insist that after judgment or settlement PRP "B" can seek to recover its costs from PRP "A" in contribution under section 113(f)(1).

Other flaws plague the Government's construction. The Government claims that the phrase "any other person" refers to "innocent parties" like "'a landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands,'" Pet. Br. 16 (quoting dicta from *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30

F.3d 761, 764 (7th Cir. 1994)), or a person who qualifies as a "bona fide prospective purchaser" ("BFPP") under 42 U.S.C. §§ 9601(40) and 9607(r)(1) and is not a PRP by operation of law. Petr. Br. 16. But a landowner whose property is contaminated by releases from neighboring lands is a PRP except in the narrow circumstance where a statutory defense applies; the contaminated property would be a "facility" under CERCLA, a term which is defined to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9)(B). The owner of contaminated property in the Government's example is the "owner and operator of ... a facility," *id.* § 9607(a)(1), and thus a PRP.

While the Government is correct that a BFPP is not a PRP if he does not impede response actions, *id.* § 9607(r)(1), the BFPP exception was not enacted until 2002. Pub. L. No. 107-118, § 222(b), 115 Stat. 2356, 2368, 2371 (2002). So under the Government's reading, from the passage of CERCLA in 1980 until 2002, the private parties entitled to institute a cost-recovery action under section 107(a) formed almost a null set. The Government has not cited a single case of an "innocent" private party who has brought suit under section 107(a), but, if there are any, it is inarguably a minuscule number. It is implausible to surmise that Congress created this central feature of CERCLA to provide only these rare parties with a remedy.

Indeed, the label "innocent" party is itself a misnomer. Because CERCLA creates strict liability and does not require wrongdoing, Pet. App. 4a, a PRP is often innocent in any ordinary sense of the word. PRPs include current site owners who did not release hazardous substances and may not even have known of their existence. But the Government's position would mean that the current owner – who is often the party who voluntarily cleans up hazardous substances on his or her property (rather than wait to be sued or approached for settlement by federal or state authorities) – has no recourse to

recover costs against persons whose culpability for the hazardous waste release is far greater. That could not have been Congress's intent.

Furthermore, the Government's current litigating position – that only so-called innocent parties may bring a section 107(a) action for cost recovery – is directly contrary to EPA's construction in its regulations. The applicable regulation (promulgated after SARA, see 59 Fed. Reg. 47384, 47452 (Sept. 15, 1994)) provides that, absent a statutory prohibition, "any person may undertake a response action to reduce or eliminate a release of a hazardous substance, pollutant, or contaminant," 40 C.F.R. § 300.700(a), and under section 107(a) "any person may receive a court award of his or her response costs, plus interest, from the party or parties found to be liable," *id.* § 300.700(b)(1).[4] Discussion of that regulation – which follows the natural interpretation of section 107(a) – is conspicuously absent from the Government's brief. The Government's construction of section 107(a) is unsound.[5]

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[4] The Government's construction of section 107 would also bar PRPs working under an EPA-issued Unilateral Administrative Order ("UAO") from recovering clean-up costs from other responsible parties. Lower courts have held that UAOs are not civil actions for purposes of contribution claims under section 113(f)(1), thereby barring an action under that section. *Raytheon Aircraft Co.* v. *United States*, 435 F. Supp. 2d 1136 (D. Kan. 2006). However, recognizing the inequity in such a holding, that court allowed the PRP to pursue an action to recover its costs under section 107, exactly the type of action the Government's position here would foreclose.

[5] The Government has successfully taken the manifestly unfair position that it has a section 107(a) remedy to recover costs it incurs not in its governmental capacity but as a PRP, *United States* v. *Simon Wrecking, Inc.*, No. 06-928, 2007 WL 789189, at *4 (E.D. Pa. Mar. 14, 2007), even though the statute requires that its provisions apply "both procedurally and substantively" in the same manner to the federal government and private parties, 42 U.S.C. § 9620(a)(1).

II. THE CREATION OF EXPRESS REMEDIES IN SECTION 113 DID NOT WHOLLY ELIMINATE SECTION 107(a) RIGHTS OF ACTION FOR PRPs.

As the foregoing demonstrates, section 107(a) implies a private right of action in favor of PRPs to recover response costs from other PRPs. A subsequent amendment to a statute, however, may alter the implications to be drawn from an existing statute. Petr. Br. 26; *United States* v. *Fausto*, 484 U.S. 439, 453 (1988). SARA created express contribution remedies for private parties in 1986, and there is no longer a need to imply a remedy under section 107(a) in circumstances where PRPs have an express remedy under section 113. Pet. App. 17a ("liable parties which have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality"); see *Alexander* v. *Sandoval*, 532 U.S. 275, 290-91 (2001); *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973) (express remedies exclusive where they "clearly appl[y]").[6]

But that does not mean, as the Government suggests, that the enactment of section 113 eliminated *all* preexisting section 107(a) remedies for PRPs. Section 113(f) was enacted only to eliminate doubt as to whether section 107(a) implied a right to seek *contribution* once federal CERCLA liability is established. Either section 113 created a wholly new and complementary remedy (if the implied action under section 107(a) never extended to contribution remedies), or alternatively section 113 displaced the implied section 107(a) remedies *pro tanto*. H.R. Rep. No. 99-253, pt. 1, at 79 (1985) ("[Section 113(f)] clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially responsible parties."); *see also Key Tronic Corp.*, 511 U.S. at 816 (noting that after SARA,

[6] The language of section 113 indicates that it is the exclusive remedy for contribution claims within its purview, mandating that "[s]uch claims *shall* be brought in accordance with this section." 42 U.S.C. § 9613(f)(1) (emphasis added).

CERCLA "expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107"). There is no cause to infer that Congress intended to displace all existing section 107 remedies of PRPs.

Furthermore, the Government's primary policy-based argument in support of its wholesale displacement theory has no force. The Government argues that SARA embodies congressional intent to discourage "unsupervised cleanups" by giving PRPs a right of cost recovery *only* in contribution under section 113, thus encouraging PRPs to settle with the government. Petr. Br. 13. But, perversely, the Government's position would foreclose any action for cost recovery by most PRPs that have conducted clean-up under the supervision of *state* authorities, even recovery against those actually responsible for the contamination. Given the predominance of state agency oversight in hazardous-waste clean-ups, such an intent cannot be imputed to Congress.

This Court must analyze the proper relationship of section 107(a) and section 113 in light of the respective roles of federal and state law in regulating clean-up of sites contaminated with hazardous substances. See *Transamerica Mortg. Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 19-20 (1979) (implied rights of actions are to be determined by analysis of express remedies). State environmental agencies supervise clean-up at the vast majority of such sites. Those state authorities have abatement powers not from CERCLA but only pursuant to state law. Congress clearly did not intend to deny cost recovery to PRPs who clean up hazardous wastes under the supervision of state authorities, as even the Government would apparently concede (see Petr. Br. 36-40). This Court cannot reasonably adopt a construction that would have that result.

A. State Environmental Agencies Regulate Hazardous Waste Clean-Up At Most Sites.

Any interpretation of CERCLA must begin with recognition of the sheer magnitude of the problem that confronted Congress in the late seventies. "In 1979 the EPA estimated that as many as 30,000 to 50,000 sites existed, of which between 1,200-2,000 present[ed] a serious risk to public health." H.R. Rep. No. 96-1016, pt. 1, at 18 (1980). Only six years later, as Congress was considering the Superfund Amendments and Reauthorization Act, there were an estimated 10,000 Superfund sites posing a serious risk to public health. H.R. Rep. No. 99-253, pt. 1, at 55. Because Congress recognized that the "EPA will never have adequate monies or manpower to address [all hazardous waste sites]," it anticipated that federal enforcement would concentrate on high priority sites. *Id.* To that end, section 105 requires the EPA to establish criteria for determining the priority of response actions, based on the relative risk to public health and the environment. 42 U.S.C. § 9605(a)(8)(A)-(B). Congress envisioned that EPA would respond directly only to "the nation's worst sites." S. Rep. No. 107-2, at 2 (2001).

The principal mechanism by which Congress promotes clean-up of hazardous wastes at other sites is through the creation of strict private liability for response costs under section 107. Cf. H.R. Rep. No. 96-1016, pt. 1, at 17 (noting the dual purpose of Congress to encourage prompt clean-up of hazardous-waste sites and to hold responsible parties liable for clean-up costs).

Importantly, CERCLA does not grant direct federal enforcement or abatement authority to the States, nor does the statute provide for general delegation of the program to the States. Under section 104, EPA may (but only rarely does) delegate federal authority to conduct response actions to any State capable of carrying out actions under that section, upon execution of a site-specific cooperative agreement with the EPA. 42 U.S.C. § 9604(d)(1). Finally, section 107(a) allows

a State to recover any clean-up costs it has incurred from a PRP. *Id.* § 9607(a)(4)(A). But States have no power under CERCLA to obtain money from the Superfund or to compel PRPs to conduct clean-up activities. Hence, Congress recognizes that "[t]he vast majority of contaminated sites across the Nation will not be cleaned up by the Superfund program. Instead, most sites will be cleaned up under State authority." S. Rep. No. 107-2, at 15.[7]

Various state laws create an extensive network of authority governing hazardous-waste site clean-up.[8] In a single year, States supervised more than four times as many clean-ups under various state laws as the EPA has supervised pursuant to CERCLA since its enactment in 1980.[9] This discrepancy results from the EPA's focus on a limited number of high priority sites; while the NPL contains about 1,200 sites, States have identified about 63,000 known or suspected sites. Envtl. L. Inst., *supra*, at 15. While laws vary from state to state, the majority of states have authorities analogous to the EPA's authority under CERCLA. *Id.* at 13. The various state programs generally provide for some combination of the following: emergency response actions, permanent remediation, a

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[7] States sometimes bring judicial actions with mixed abatement and cost-recovery claims under both state and federal law, without differentiating under which law its abatement authority arises. But States clearly have no authority to compel response actions under CERCLA.

[8] All 50 states, as well as the District of Columbia and Puerto Rico, have laws providing for authority over hazardous-waste sites. Envtl. L. Inst., *An Analysis of State Superfund Programs: 50-State Study, 2001 Update* 54-59 (Nov. 2002), *available at* http://www.elistore.org/reports_detail.asp?ID=10746.

[9] During fiscal year 2000, states completed more than 4,500 cleanups. Envtl. L. Inst., *supra*, at 7. By the end of FY 2000, states had conducted approximately 29,000 total cleanups. *Id.* Meanwhile, as of December 2006, the EPA had completed cleanup-phase construction at only 1,006 NPL sites. EPA, *Superfund National Accomplishments Summary Fiscal Year 2006* (Mar. 2007) *at* http://www.epa.gov/superfund/action/process/numbers06.htm.

fund or other financing mechanism, abatement authority to order PRPs to take action, and procedures providing for public participation. *Id.*

New Jersey was at the forefront of hazardous-waste site clean-up legislation. In 1976, the Spill Compensation and Control Act was codified.[10] N.J. Stat. Ann. § 58:10-23.11 *et seq*. The Act created a comprehensive scheme for cleaning up hazardous-waste sites and holding responsible parties liable. As is generally true under CERCLA, dischargers[11] are subject to strict, joint, and several liability. Under the Act, the State maintains a list of known contaminated sites, similar to CERCLA's NPL. *Id.* § 58:10-23.16. The Act creates a fund which the New Jersey Department of Environmental Protection ("NJDEP") may use to respond to discharges of hazardous waste. *Id.* § 58:10-23.11i. The NJDEP may then recover fund expenditures from dischargers. *Id.* § 58:10-23.11q. Finally, the Act allows one discharger to sue another for contribution. *Id.* § 58:10-23.11f.[12]

New York's law governing hazardous-waste site clean-up mirrors CERCLA in many respects. N.Y. Envtl. Conserv. Law § 27-1301 *et seq*. Indeed, the New York legislature enacted this statute as a complement to CERCLA, finding that "federal legislation would rely on state programs for the iden-

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[10] This New Jersey law was the model for CERCLA. Envtl. L. Inst., *supra*, at 11.

[11] Dischargers are defined as "any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance." N.J. Stat. Ann. § 58:10-23.11g(c)(1).

[12] In addition to the CERCLA-like Spill Act, New Jersey has a number of other laws relating to the cleanup of hazardous-waste sites. The Industrial Site Recovery Act requires owners or operators of an industrial establishment to obtain NJDEP approval before transferring industrial property or closing operations, effectively requiring cleanup of industrial properties before transfer. N.J. Stat. Ann. § 13:1K-6 *et seq*. In 1998, New Jersey enacted the Brownfields and Contaminated Sites Remediation Act. *Id.* § 58:10B. The Act allows the NJDEP to oversee and approve cleanup activities at sites that are not on state or federal priority lists. *Id.*

tification and management of inactive sites," and recognizing the need "to ensure that state and local governments will be prepared to implement those federal programs." 1979 N.Y. Sess. Laws 599, 600. The law provides for listing of priority sites, for financing of clean-ups with state funds, and for joint and several liability among PRPs. N.Y. Envtl. Conserv. Law § 27-1305; N.Y. State Fin. Law § 97-b; N.Y. Comp. Codes R. & Regs. tit. 6, § 375-2.2. However, like the majority of states,[13] New York does not have statutory provisions allowing private parties to bring contribution or cost recovery actions. Instead, only the New York State Department of Environmental Conservation can pursue an action against a PRP. See 2 Gerrard, *supra* § NY.04[2]. In addition to its state superfund law, New York oversees hazardous-waste site clean-up under its Brownfield Cleanup Program. N.Y. Envtl. Conserv. Law § 27-140[illegible] *et seq.*

Under New York's Superfund and Brownfield Cleanup Programs, remediation programs are selected by the NYSDEC (with input from the New York State Department of Health) based on the same criteria and hierarchy of preferred remedial strategies as CERCLA National Priority List sites. The NYSDEC is aggressive in its clean-up and enforcement efforts under the State Superfund law. Since state fiscal year 1985/1986, New York has issued a total of 1,128 orders on consent, requiring responsible parties to pay for or conduct remedial activities. See NYSDEC, *Annual Remedial Programs Report for State Fiscal Year 2005-06*, at iii (2006),

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[13] Many states enacted analogous statutes governing hazardous-waste site clean-up in the wake of CERCLA, although fewer than 15 states have statutory contribution provisions. *See generally* 2 Michael B. Gerrard, *Brownfields Law & Practice* §§ AL.01-WY.08 (2006) (state-specific chapters discussing state superfund laws). States presumably have not enacted such cost-recovery laws because PRPs were deemed to have full recourse under CERCLA. The following states provide some statutory right of action for private parties to recover cleanup costs: Arkansas, California, Delaware, Georgia, Hawaii, Indiana, Louisiana, Minnesota, Montana, New Hampshire, New Jersey, Oregon, Pennsylvania, and Utah. *Id.*

available at http://www.dec.state.ny.us/website/der/2006annualreport.pdf; NYSDEC, *Annual Remedial Programs Report for State Fiscal Year 2004-05*, at iv (2005), *available at* http://www.dec.state.ny.us/website/der/2005annualreport.pdf. As of March 31, 2006, the NYSDEC had completed remediation at a total of 487 sites listed on the State's priority list, with responsible parties contributing an estimated 68 percent of the costs – approximately $4.51 billion. NYSDEC, *supra*, at iii (2006). Additionally, cost-recovery actions brought by the State against PRPs during state fiscal year 2005/2006 accounted for $17.9 million in revenue for the NYSDEC. *Id.* at 4.

The importance of state direction and oversight in the clean-up of hazardous-waste sites is substantiated in the 2002 CERCLA amendments. Congress recognized the limitations of federal oversight under CERCLA when it adopted those amendments, noting that the "intent of the bill is to direct more public and private resources toward restoring contaminated properties that are not likely to be addressed by the Federal Government." S. Rep. No. 107-2, at 4. The Small Business Liability Relief and Brownfields Revitalization Act amended CERCLA in several important respects. The amendments added section 128, which prohibits the EPA from using its section 106 or section 107(a) authorities when a clean-up is being conducted pursuant to a qualified state program, with certain limited exceptions. 42 U.S.C. § 9628(b)(1)(A) & (B).[14] The amendments also added new section 105(h). *Id.* § 9605(h). Under that section, the EPA must defer listing a site on the NPL, at a State's request, if the site is undergoing clean-up activities pursuant to state law.

[14] The EPA may use its abatement powers if (1) the state requests EPA assistance; (2) the contamination has crossed state lines; (3) a release or threatened release may present an imminent and substantial danger to public health or the environment and additional actions are necessary to address the release; or (4) new information shows that the contamination poses a threat requiring further action. 42 U.S.C. § 9628(b)(1)(B).

Id. This provision was intended to "create a strong incentive for parties to agree to work with *State authorities* to clean up a site." S. Rep. No. 107-2, at 20 (emphasis added). These provisions evince Congress's intent that federal supervision pursuant to CERCLA be limited to high priority sites, while states oversee the vast majority of clean-up activities.[15]

B. Courts Have Interpreted Section 113(f)(3)(B) Narrowly To Provide A Contribution Remedy Only For The Limited *Federal* Liability Of A PRP To A State.

The Government attempts to draw support for its position from section 113(f)(3)(B), which grants a contribution remedy to "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement." 42 U.S.C. § 9613(f)(3)(B). The Government argues that Congress intended section 113 to be the exclusive remedy for PRPs, so as to encourage settlements with federal and state governments. Petr. Br. 26, 36-43. Indeed, the Government suggests that if a property owner wishes to recover clean-up costs from another PRP, it "need only enter into a settlement with the federal or state government," and then proceed under section 113(f)(3)(B). *Id.* at 43. The Government neglects the prevailing judicial construction of section 113(f)(3)(B), which would *not* provide the vast ma-

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[15] The Government repeatedly refers to "unsupervised cleanups," Petr. Br. 39, or "'wholly voluntary, unsupervised, *sua sponte* cleanup operation[s],'" *id.* at 41. This characterization of clean-up activities as pure voluntarism is misleading. While there are undoubtedly cleanups conducted with no government oversight or approval, state laws addressing hazardous-waste site cleanup are extensive, as discussed above, and the majority of cleanups (including the clean-up performed by Con Edison in the *Consolidated Edison* case before the Second Circuit) are conducted with state agency oversight. Precluding those PRPs working under a state settlement or cooperation agreement—with comprehensive state supervision—from maintaining a cost recovery action would not encourage such settlements.

jority of PRPs who settle or otherwise cooperate with state authorities *any* remedy to recover response costs.

Despite the prevalent role of states in hazardous waste clean-up, many courts have interpreted this section narrowly to allow contribution actions only when a PRP has resolved its *federal* CERCLA liability to a State. See, *e.g.*, *Consolidated Edison*, 423 F.3d at 95-96; *Differential Dev.-1994, Ltd.* v. *Harkrider Distrib. Co.*, No. H-05-3375, 2007 WL 87661 (S.D. Tex. Jan. 9, 2007); *Raytheon Aircraft Co.* v. *United States*, 435 F. Supp. 2d 1136 (D. Kan. 2006); *W.R. Grace & Co.* v. *Zotos Int'l, Inc.*, No. 98-CV-838S(F), 2005 WL 1076117 (W.D.N.Y. May 3, 2005); *City of Waukesha* v. *Viacom Int'l Inc.*, 404 F. Supp. 2d 1112 (E.D. Wis. 2005); *General Time Corp.* v. *Bulk Materials, Inc.*, 826 F. Supp. 471 (M.D. Ga. 1993).

Courts adopting this view have reasoned that "the right to contribution under section 113(f)(3)(B) is defined by the scope of the liability resolved." *Raytheon*, 435 F. Supp. 2d at 1144. They have disallowed a section 113(f)(3)(B) action when the clean-up was conducted pursuant to a voluntary state program, *Differential Dev.-1994*, 2007 WL 87661, at *8-9, and prohibited contribution actions where federal CERCLA liability is not resolved in the state settlement agreement, *General Time*, 826 F. Supp. at 474-76. The Second Circuit based its narrow interpretation of section 113(f)(3)(B) on the statutory use of the term "response action." *Consolidated Edison*, 423 F.3d at 95-96. The court reasoned that because a response action is a "*CERCLA*-specific term," and such an action is a prerequisite to a contribution action under section 113(f)(3)(B), only settlements resolving federal CERCLA liability to a State may provide the basis for a section 113(f)(3)(B) suit. *Id.*

If section 113(f)(3)(B) grants a PRP a right in contribution to recover only the response costs for which it has *federal* liability to a State under CERCLA, it is a very narrow remedy. As discussed above, a PRP is liable to a State under CERCLA

only when the State itself expends resources in conducting a clean-up. 42 U.S.C. § 9607(a)(4)(A) (PRPs are liable for "all costs of removal or remedial action *incurred by ... a State* ... not inconsistent with the national contingency plan") (emphasis added). The State has no abatement power under CERCLA, and thus a PRP has no liability under CERCLA to a State comparable to the PRP's liability under section 106 to the United States. See *id.* § 9622(c)(1) & (2). Thus, under the prevailing judicial interpretation that section 113(f)(3)(B) applies only to a PRP's settlement of its *federal* liability to a State (*i.e.*, only to its liability for response costs that have been or would be incurred by the State itself), the contribution remedy of section 113(f)(3)(B) is extremely limited. There would be no section 113(f)(3)(B) contribution remedy for the many PRPs who (like Con Edison) incur *their own response costs* pursuant to voluntary cooperation agreements or settlements with state regulatory agencies under state law. Indeed, the Second Circuit so held in ruling that the release and covenant-not-to-sue in Con Edison's VCA resolved only state law liability, and thus Con Edison had no remedy under section 113(f)(3)(B). *Consolidated Edison*, 423 F.3d at 92-93.

In spite of the Second Circuit's narrow interpretation of section 113(f), it did not bar Con Edison from recovering its costs from UGI; rather it is one of a number of courts that have allowed PRPs to recover clean-up costs under section 107(a). *Id.* at 97-100; *Raytheon Aircraft*, 435 F. Supp. 2d at 1145-51; *Viacom, Inc.* v. *United States*, 404 F. Supp. 2d 3, 6-7 (D.D.C. 2005); *City of Bangor* v. *Citizens Commc'ns Co.*, 437 F. Supp. 2d 180, 220 (D. Me. 2006). Indeed, this Court has noted that section 107(a) "unquestionably provides a cause of action for private parties to seek recovery of cleanup costs." *Key Tronic Corp.*, 511 U.S. at 818. The section 107(a) cause of action "impliedly authorizes private parties to recover cleanup costs from *other* PRP's." *Id.* (emphasis added). Based on the plain language of section 107(a), the Second Circuit held that Con Edison could maintain a cost

recovery action against UGI because Con Edison is a person for purposes of CERCLA, 42 U.S.C. § 9601(21), and it incurred "costs of response" associated with a "removal" and "remedial action." *Consolidated Edison*, 423 F.3d at 99. If the Government's contrary position carries the day, and PRPs are barred from instituting cost recovery actions under section 107(a), those PRPs working with state authorities to clean up contaminated sites will be left with no avenue to collect their response costs from other PRPs.

C. The Express Contribution Remedies Of Section 113(f) Are Complementary To The Implied Rights Of Action Under Section 107(a).

The right answer is the one arrived at by the court of appeals below. Section 107(a) allows PRPs to maintain a private right of action to recover response costs, and the section 113 remedies are complementary to section 107(a) remedies (displacing them only *pro tanto*). Pet. App. 17a. In enacting SARA, Congress dispelled uncertainty over whether the implied private right of action of section 107(a) included an implied right of contribution once a PRP's CERCLA liability has been established by judgment or settlement, since contribution remedies are not readily implied in federal statutes. *Cooper*, 543 U.S. at 162; *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 638-47 (1981). Congress's intent in SARA was to broaden the availability of cost recovery actions, not to restrict them.

In this vein, the Government's wholly misconceives the legislative history regarding SARA's promotion of negotiated clean-ups. The Government is right that SARA was meant to "encourage private party settlements and cleanups. . . . Private parties may be more willing to assume financial responsibility for some or all of the cleanup if they are assured that they can seek contribution from others." H.R. Rep. No. 99-253, pt. 1, at 80. But Congress achieved that goal by giving certainty to private parties that settling with state or federal authorities would not extinguish their right to cost recovery

from other PRPs. To eliminate doubt as to whether an implied right of contribution under section 107(a) exists in that circumstance, Congress created an express right of action in section 113(f) for contribution. See H.R. Rep. No. 99-253, pt. 3, at 20 (1985) (Congress specifically "included this provision to encourage settlements and to avoid problems that might otherwise arise due to the courts' reluctance to imply new private rights of action under federal statutes") (discussing the need for an explicit provision allowing a settlor to seek contribution from a non-settlor). Section 113(f) ensured that no PRP settling with federal or state authorities would have to bear the entire burden of response costs for which another PRP is justly held responsible in part.

If the Court adopts the correct view of section 113 as complementary to section 107(a) – either creating a new remedy where one could not be implied under section 107(a), or displacing existing section 107(a) remedies *pro tanto* – it need not at this time resolve the substantive scope of section 113(f)(3)(B). Every PRP would have a private right of action to recover response costs, either under section 107(a) or (when it applies) section 113(f). The boundaries between 107(a) and 113(f) would be a matter for the lower courts.

However, if this Court were to contemplate the Government's narrow construction of section 107(a) (despite the flaws outlined above, *supra* at 11-14), it must grapple with the substance of the express remedy of section 113(f)(3)(B). It is unfathomable that Congress would have intended a highly restrictive implied right of action under section 107(a) *and* a highly restrictive express right of contribution under section 113(f)(3)(B). There is simply no plausible interpretation of CERCLA that would exclude PRPs working closely with state authorities under a voluntary clean-up or settlement agreement from maintaining cost-recovery actions against other PRPs.

If *arguendo* the Government were correct that section 107(a) affords a private right of action only to "innocent" par-

ties, at a minimum that could only be so if section 113(f)(3)(B) conferred a broad contribution remedy on settling parties. As noted above, *supra* at 23, courts that have construed section 113(f)(3)(B) restrictively have generally read the phrase "person who has *resolved its liability to* the United States or *a State* for some or all of a response action," 42 U.S.C. § 9613(f)(3)(B) (emphases added), to refer to the PRP's *CERCLA* liability. See, *e.g.*, *Consolidated Edison*, 423 F.3d at 95 ("We read section 113(f)(3)(B) to create a contribution right only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved."). But that is by no means a necessary or even a preferred reading of the statutory language. When Congress meant to refer strictly to federal liability under CERCLA, it knew how to do so with specificity. See, *e.g.*, 42 U.S.C. § 9613(f)(1) (referring to persons "liable or potentially liable under section 9607(a) of this title"); *id.* § 9622(c)(2)(A) (noting that provision does not affect "[t]he liability of any person under section 9606 or 9607 of this title"); *id.* § 9622(f)(1) (referring to covenants not to sue "concerning any liability to the United States under this chapter"). Section 113(f)(3)(B), however, refers only to the resolution of "liability," without any qualification as to the legal basis for the liability. Given Congress's awareness that most hazardous waste clean-up would occur under state law, the natural reading of this section is that Congress granted an express contribution remedy to any one who has resolved "some or all" of his liability to a State, regardless of the type of claim that the State could have brought to enforce that liability. *Id.* § 9613(f)(3)(B). Section 113(f)(3)(B) allows a person potentially liable in a state abatement action to enter into an agreement with a State to "respond" to a hazardous-waste site by performing a "removal" or "remedial action" under CERCLA, *id.* § 9601(23)-(25), and then seek contribution for those response costs from another responsible party.

This Court need not venture down this path of construing section 113(f), because (for all the foregoing reasons) the Government's construction of section 107(a) is too flawed to command allegiance. The proper interpretation of sections 107(a) and 113(f) – and all that is necessary to resolve this case – is that they afford complementary remedies, and the latter displaces the former only *pro tanto*.

D. Recognition Of An Implied Right Of Action For PRPs Under Section 107(a) Creates No Anomalies.

The Government seeks to defeat this common-sense construction of CERCLA by arguing that recognizing an implied right of action in favor of PRPs would create various anomalies. None of its arguments has force.

First, the Government argues that recognition of a section 107(a) implied right of action would nullify the section 113(f) remedy because the former has a longer statute of limitations. Petr. Br. 30-31; see 42 U.S.C. § 9613(g)(2) & (3). But that argument is based on the Government's false supposition that a PRP who qualifies for a section 113(f) remedy may elect to proceed under section 107(a) as an alternative. See Petr. Br. 32-33. There is no warrant for implying a right of action where Congress has given a specific express remedy. A PRP only has a section 107(a) remedy until a section 113(f) remedy accrues: *i.e.*, until there is a "judgment in any action under this chapter for recovery of such costs or damages," or "an administrative order" under section 122 or "a judicially approved settlement with respect to such costs or damages." 42 U.S.C. § 9613(g)(3)(A) & (B).[16] A PRP cannot rely on the

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[16] A claim for contribution may be asserted "during or following any civil action under section 9606 of this title or under section 9607(a) of this title." 42 U.S.C. § 9613(f)(1). A contribution claim brought by a PRP "during" a civil action against it – but prior to any judgment or settlement of liability against that PRP – would be a contingent counterclaim, cross claim, or third-party claim anticipating the possibility of a subsequent judgment or settlement of liability. *See* Fed. R. Civ. P. 13(a), (b), (c) &

longer statute of limitations for section 107(a) actions once a section 113(f) right of action accrues.

Second, the Government suggests that recognition of a section 107(a) action in favor of PRPs is unfair to other PRPs at the site who have already settled with the government. "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." *Id.* § 9613(f)(2). The Government reasons that the section 113(f)(2) settlement bar only applies to contribution actions under section 113(f)(1) or (3), but not section 107(a) cost-recovery actions; therefore the latter should not be implied. Petr. Br. 31. Even if *arguendo* the Government's interpretation of section 113(f)(2) – which is controversial and beyond the scope of this brief – were correct, the federal courts have latitude in section 107(a) to recognize an implied settlement bar defense parallel to section 113(f)(2) if necessary to the proper implementation of CERCLA.[17]

Third and finally, the Government contends that it would be anomalous "to permit a PRP to pursue an action against another PRP for joint and several liability under Section 107(a) in lieu of an action under Section 113(f), which permits recovery only for an equitable share of the costs." *Id.* But this Court has not held that joint and several liability is inexorably applied in section 107(a) actions, *Cooper Industries*, 543 U.S. at 169-70 (leaving open whether a plaintiff "may pursue a § 107 cost recovery action for some form of liability other than joint and several"), and indeed, in the years after CERCLA was enacted, courts have rejected a rigid application of joint and several liability under section 107. See *Allied Corp.*

14(a) (discussing claims that another party "may be liable").

[17] Moreover, this argument does not aid the Government. Under its theory of section 113(f)(2), the section 107 actions it endorses (those brought by innocent parties) could likewise be brought against settling PRPs, and the prior settlement could not be invoked as a defense.

v. *Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1116 (N.D. Ill. 1988) ("*regardless of the indivisibility of the harm*, where the peculiar facts of the case point to a more fair apportionment of liability [the court may reject application of joint and several liability].") (emphasis added); *United States* v. *Hardage*, 116 F.R.D. 460, 465-66 (W.D. Okla. 1987); *United States* v. *A & F Materials Co.*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984). Recognizing that small contributors may not be able to prove divisible harm, one court held that compulsory application of joint and several liability "must be avoided because both Houses of Congress were concerned about the issue of fairness, and joint and several liability is extremely harsh and unfair if it is imposed on a defendant who contributed only a small amount of waste to the site." *Id.* (applying so-called "Gore Amendment" factors to apportion liability); see also *Allied Corp.*, 691 F. Supp. at 1116-18 (citing use of Gore factors with approval). Thus, in adjudicating implied rights of action for cost recovery under section 107a, courts have modified joint-and-several liability to permit a just apportionment of damages consistent with the novel legal liability regime created by CERCLA.

The only true anomaly would be the one created by the Government's position, where PRPs who incur costs remediating or removing hazardous substances are barred in many circumstances from recovering those costs even from more culpable parties who are equally liable under CERCLA.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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